No. 82-1876

In the Supreme Court of the United States

OCTOBER TERM, 1983

FOREMOST PRO COLOR, INC., PETITIONER

v.

EASTMAN KODAK COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the district court properly dismissed petitioner's antitrust claims for failure to state a claim, where the damage to petitioner from alleged "tie-in" and monopolization offenses reflected only the effects of technological innovations by respondent.

2. Whether respondent's alleged discriminatory failure to make prompt delivery of photofinishing equipment and provide related technical services violated Section 2(e) of the Robinson-Patman Act.

3. Whether petitioner's assertion of price discrimination stated a claim under Section 2(a) of the Robinson-Patman Act.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 703 F.2d 534. The judgment and order of the district court dismissing petitioner's federal claims (Pet. App. B1-B6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1983. The petition for a writ of

certiorari was filed on May 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Relevant provisions of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2), Section 3 of the Clayton Act (15 U.S.C. 14), and Section 2(a) and (e) of the Robinson-Patman Act (15 U.S.C. 13(a) and (e)), are set forth at Pet. App. C1-C5.

STATEMENT

Respondent Eastman Kodak Company manufactures cameras, film, and photographic paper, as well as chemicals and equipment used for developing film (Pet. App. A2). It is also a photofinisher that develops negatives and prints photographs. It enjoys a dominant position in the markets for photographic film and conventional amateur still cameras. In addition, more than 80% of all photofinishing is conducted with Kodak-manufactured photofinishing equipment, photographic paper, and chemicals. *Ibid.*

Petitioner Foremost Pro Color, Inc., is an authorized Kodak dealer and an independent photofinisher. Petitioner has purchased photographic equipment, paper, and chemicals from Kodak for resale to petitioner's customers. It has also purchased photographic equipment, paper, and chemicals from Kodak for use in petitioner's own photofinishing business. Petitioner is thus both a customer and a competitor of Kodak. (*Ibid.*)

1. Petitioner's complaint stems from Kodak's development and introduction in 1972 of a new amateur camera, the 110 "Pocket Instamatic," and related products. The 110 camera used a different size and type of film (Kodacolor II), which required

photofinishers to use new types of paper and processing chemicals and equipment. Pet. App. A2-A3, E10, E13-E14. At the time it introduced the 110 camera and related products, and for a period thereafter, only Kodak manufactured the new film and the products used for processing it.

Petitioner, in its thrice-amended complaint, claimed that Kodak had engaged in illegal tying [1] because its introduction of the 110 system "required" petitioner to buy Kodak's new chemistry whenever it bought the new Kodacolor II film; "required" it to buy the new film whenever petitioner bought the new 110 cameras; and "required" petitioner to buy new chemistry whenever it bought the new type of photographic paper (Pet. App. E15-E16).

Petitioner also alleged (Pet. App. E17-E19) that Kodak had monopolized and attempted to monopolize the "amateur photographic market," in violation of Section 2 of the Sherman Act (15 U.S.C. 2), by "requiring" the tie-ins described above; by developing new products that were incompatible with existing products and equipment; and by withholding new products from the market "until competition from other manufacturers force[d] the introduction of these new products."

In addition, petitioner alleged violation of Section 2(a) and (e) of the Robinson-Patman Act (15 U.S.C. 13(a) and (e)), resulting from (i) Kodak's denying petitioner certain payment terms that Kodak provided petitioner's competitors, and (ii) Kodak's alleged failure to deliver photofinishing equipment to petitioner on the same schedule and with the same

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[1] Petitioner claimed that the tie-ins violated both Section 1 of the Sherman Act (15 U.S.C. 1) and Section 3 of the Clayton Act (15 U.S.C. 14).

services as it provided petitioner's competitors (Pet. App. E11-E13, E19-E21).

The district court dismissed these claims for failure to state a claim on which relief may be granted (Pet. App. B5-B6).[2]

2. The court of appeals unanimously affirmed (Pet. App. A1-A22). It held that petitioner's claim of illegal tying was defective, because "[i]f the buyer is free to take either product by itself, 'there is no tying problem' " (Pet. App. A8, quoting *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 6 n.4 (1958)). Petitioner did not adequately allege tying, the court found, because it did not claim that Kodak conditioned the purchase of any one of its products on the purchase of any other (Pet. App. A10). The court added that "standing alone," the technological interrelation among complementary products, which is the real basis for petitioner's complaint, is not "sufficient to establish the coercion essential to a *per se* unlawful tying arrangement" (Pet. App. A11).[3] Indeed, since product innovation "is in many cases the essence of competitive conduct[,]" placing so-called "technological ties" in a per se category "could become a roadblock to * * * competition" (*ibid.*).

The court rejected petitioner's Section 2 claims premised on illegal tie-ins for the same reasons it had rejected the tying claims themselves (Pet. App. A14). As to petitioner's complaints that Kodak had violated Section 2 by introducing new products compatible

[2] The court also granted summary judgment to respondent on a variety of contract claims arising under state law. See Pet. App. A3-A6.

[3] The court of appeals observed that petitioner proceeded under a theory of per se violation, and did not challenge the arrangement under the rule of reason (Pet. App. A9).

with each other but incompatible with competitors' products, and by timing product introduction to maximize profits, the court held that Kodak had the right to redesign its products to make them more attractive to buyers, and that as a general rule even a monopolist may " 'bring its products to market whenever and however it chooses' " (Pet. App. A16-A17, quoting *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 286 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) (*Berkey*)).[4]

Finally, the court held that petitioner's claim that Kodak had violated Section 2(e) of the Robinson-Patman Act was fatally flawed because it failed to allege "resale" of the products whose delivery was purportedly delayed or with respect to which Kodak failed to provide technical assistance (Pet. App. A18-A20). And it concluded that petitioner's Section 2 (a) allegations concerning discriminatory credit terms were defective because they failed to claim the statutorily required effect on competition, referring instead only to the effect on petitioner (*id.* at A20-A22).

DISCUSSION

The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, is correct, and does not merit further review.

1. Petitioner errs in claiming (Pet. i, 10-13) that the decision below conflicts on the subjects of tying and monopolization with the Second Circuit's decision in *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra.*

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[4] The court stated that other conduct associated with the introduction of a new product might in appropriate cases give rise to Section 2 liability, but noted that no such conduct was alleged in this case (Pet. App. A16-A17).

a. There is no conflict on the Sherman Act Section 1 and Clayton Act Section 3 tying claim, because, as the *Berkey* opinion makes clear, the Second Circuit was not presented with such claims and accordingly did not even discuss, let alone rule on them. *Berkey*, 603 F.2d at 267-268. There is also no conflict with *Berkey* on the Sherman Act Section 2 version of petitioner's tying claim. The Second Circuit did discuss a Section 2 monopolization claim based on alleged "systems selling" of the new 110 camera and film, and that claim is arguably analogous to plaintiff's tying contention concerning systems selling of photofinishing products. But the Second Circuit held that the joint promotion of the two products did not violate Section 2, and thus its ruling is consistent with the comparable holding in favor of Kodak below. See *Berkey*, 603 F.2d at 285-288.

The court of appeals' decision is also consistent with this Court's decisions on tying. The Court has emphasized that "where the buyer is free to take either product by itself there is no tying problem * * *." *Northern Pacific Ry.* v. *United States*, 356 U.S. at 6 n.4; *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953). Indeed, Section 3 of the Clayton Act is specific in this regard, for it outlaws only the sale of goods "on the condition * * * that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the * * * seller * * *."

Petitioner has never claimed that it was not free to buy the various Kodak 110 products separately, or that Kodak as a condition of sale of one of those products required that it purchase others (Pet. App.

A10). Rather, petitioner's contention appears to be that the Court should create a new per se offense of "technological tying" (see Pet. App. A11). The consequence of creating such an offense (whether under the Sherman Act or the Clayton Act) would be flatly to prohibit any firm with substantial market power from introducing a cluster or system of products unless each product was immediately compatible with other existing products.

Such a rule would be a radical and undesirable departure from precedent and from sound economics. Growth or development "as a consequence of a superior product" is not illegal, even for a monopolist. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). Accordingly, monopolists and others with substantial market power do not violate the antitrust laws by introducing useful new products, even though the innovations also disadvantage their competitors.[5]

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[5] See, *e.g.*, *California Computer Products, Inc.* v. *IBM Corp.*, 613 F.2d 727, 743-744 (9th Cir. 1979) (rejecting monopolization claim based on design changes where evidence showed cost and performance improvement); *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1330 (5th Cir. 1976) (rejecting tie-in claim because of absence of evidence that new technology was designed for the purpose of tying two products); *Transamerica Computer Co.* v. *IBM Corp.*, 481 F. Supp. 965, 1002-1008 (N.D. Cal. 1979), aff'd, 698 F.2d 1377 (9th Cir. 1983) (design changes that were improvements (or de minimis) did not constitute monopolization; design change whose only purpose was to preclude competitors was unreasonably restrictive of competition); *ILC Peripherals Leasing Corp.* v. *IBM Corp.*, 458 F. Supp. 423, 438-444 (N.D. Cal. 1978), aff'd, 636 F.2d 1188 (9th Cir. 1980) (per curiam) (engineering changes were innovations or arguable innovations; no monopolization or attempted monopolization); *Telex Corp.* v. *IBM Corp.*, 367 F. Supp. 258, 347 (N.D. Okla. 1973), aff'd in part and rev'd in part on other grounds, 510 F.2d 894

And as the court of appeals recognized, there is no economic justification for petitioner's proposed penalty on the introduction of groups of technologically related new products. The development of new products, including groups of related new products, is the essence of competition, for it initially gives consumers a wider choice and stimulates competitors to produce improved and diverse products. To be sure, until the competitors have made their response in the market the innovator may reap a premium for his product or products. But firms have an incentive to innovate precisely because they expect to capitalize on the lag between introduction of their product and their rivals' marketing of worthy competing products, and the premiums earned are the rewards for successful innovation.[6]

b. It is unclear whether petitioner also seeks review of the court of appeals' rejection of its claims that Kodak violated Section 2 of the Sherman Act by making the 110 system incompatible with existing

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(10th Cir. 1975) (integration of additional computer function into product does not constitute illegal tie-in).

Several courts have recognized that their role must be limited in evaluating claims that technological changes are anticompetitive, to avoid becoming enmeshed in unanswerable technical questions about the justifiability of product innovation. *Response of Carolina, Inc.*, 537 F.2d at 1330; *Telex Corp.* v. *IBM Corp.*, 367 F. Supp. at 347; *ILC Peripherals Leasing Corp.* v. *IBM Corp.*, 458 F. Supp. at 439, 441.

[6] As we noted in our brief (Gov't Br. at 21-28, *Jefferson Parish Hospital District No. 2* v. *Hyde*, No. 82-1031 (argued Nov. 2, 1983)), there is in fact only a narrow range of conditions under which tie-ins are likely to produce anticompetitive effects. It would be ironic to brand the introduction of a group of new products as a tie-in, and per se illegal, when it falls so far outside that narrow range.

photographic and photofinishing products and by delaying its introduction. Compare Pet. 10-13 with Pet. App. A14-A16. In any event, as we have pointed out above there is no authority in *Berkey* or elsewhere for petitioner's apparent proposition that a major technological innovation by a firm with market power in itself violates Section 2. Similarly, as the Second Circuit noted in *Berkey*, even a monopolist can generally bring its products to market whenever it chooses; there must be additional anticompetitive "associated conduct" to constitute a Section 2 violation. 603 F.2d at 286 n.30. Here no such associated conduct is alleged; rather, petitioner merely complains that Kodak introduced new products when the sales of its existing products lagged.

2.a. The court of appeals also properly rejected petitioner's claim that Kodak violated Section 2(e) of the Robinson-Patman Act by discriminatory delay in delivery of photofinishing equipment and by refusing to supply technical services for adapting petitioner's plant to the new 110 system (Pet. App. E11-E12, A18-A20). Section 2(e) by its terms applies only to "a commodity bought for resale." 15 U.S.C. 13(e). Since petitioner never alleged that it bought for resale the photofinishing equipment which is at the heart of the complaint (Pet. 13), the court of appeals rightly held that no violation had been alleged.

Nor is there any basis for petitioner's contention that the Act reaches the delivery of equipment, because the equipment is used in operations involving chemicals and paper that are resold in reprocessed form as finished photographic prints (Pet. 13-14). Section 2(e) is directed at cooperative promotional or merchandising arrangements in connection with resale of the supplier's product, not at delivery of capi-

tal equipment that is not resold, nor at technical services. It therefore does not reach technical services relating to photofinishing equipment that is not resold. See *P. Lorillard Co.* v. *FTC*, 267 F.2d 439 (3d Cir.), cert. denied, 361 U.S. 923 (1959); FTC, *Guidelines for Advertising Allowances and Other Merchandising Payments and Services* (1969), *reprinted in* 5 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 35.02, at 35-5 (1983); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 376-381 (1962 & Supp. 1964); *Sano Petroleum Corp.* v. *American Oil Co.*, 187 F. Supp. 345, 356 (E.D.N.Y. 1960).

b. The court of appeals also rightly held (Pet. App. A20-A22) that petitioner had failed to state a claim for unlawful price discrimination under Section 2(a) of the Robinson-Patman Act. Petitioner alleged that Kodak allowed it a 12% price reduction on photographic paper only if it accepted and simultaneously paid for a six-month supply, while its competitors, who got the same 12% reduction, could take delivery and pay in six monthly installments (Pet. App. E20-E21).[7] This alleges only a difference in credit terms, under which petitioner's rivals had the use of some of their money for a longer period of time than did petitioner. Except in extreme circumstances, however, courts generally have not found price discrimination solely as a result of different credit terms. *Craig* v. *Sun Oil Co.*, 515 F.2d 221, 224 (10th Cir. 1975), cert. denied, 429 U.S. 829 (1976) (no dis-

[7] Petitioner argued in the court of appeals (see also Pet. 15) that its complaint alleged simply that its competitors were offered 12% price reduction, while it was not. This appears to be a post hoc amendment of its complaint. See Pet. App. B6, E21.

crimination in difference in credit terms); *Petroleum for Contractors, Inc.* v. *Mobil Oil Corp.*, 493 F. Supp. 320, 326-328 (S.D.N.Y. 1980) (collecting cases).[8] Here petitioner failed to allege that the difference in credit terms was not based on valid business considerations, and the slight difference in credit alleged was correctly held not actionable.[9]

As the court below noted (Pet. App. A21-A22), petitioner failed to allege, as required by the statute, that the discrimination had the effect of substantially lessening competition. See 15 U.S.C. 13(a). While substantial price discrimination over time can establish a prima facie case of injury to competition (*FTC* v. *Morton Salt Co.*, 334 U.S. 37, 46, 50-51 (1948)), petitioner did not expressly claim, nor can one otherwise conclude from the complaint, that the slight difference in credit terms alleged here—which related to only one ingredient in the price of the finished product—was "substantial" and would substantially lessen competition.

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[8] This Court, however, has pointed out in a Sherman Act price-fixing context that "credit terms * * * [are] an inseparable part of the price." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (footnote omitted).

[9] Petitioner presumably would get some benefit from having a six-month supply of paper, and thus not being subject to the possible uncertainties of monthly delivery. Petitioner's claim, however, apparently is that other customers were given an additional option denied to petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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